HIGH COURT OF UTTARANCHAL AT NAINITAL

Writ Petition No. 3665 of 2001 (MS)
(Old No.13559 of 1990)

Devi Dutt Joshi retired Driver from Tehsil Bageshwar, District Almora resident of village Mahela, Post Ratli Bagar, District Almora. ..... Petitioner

Versus

1. District Magistrate, Almora
2. Director, Pension Lekhraj Market, Lucknow
3. U.P. Bhumi Byavastha Aayukta (Lekha), U.P. Board of Revenue, Lucknow
4. Joint Director, U.P. State Employees, Joint Insurance Policy (Vikas), IVth Floor Vikas Dip, 22 Station Road, Lucknow. ..... Respondents

Dated: 26.7.2006

Hon'ble Rajesh Tandon, J.

Heard Sri M.C. Kandpal, Senior Advocate, counsel for the petitioner and Standing counsel for the respondents.

By the present writ petition, the petitioner has prayed for a writ of mandamus directing the respondents not to deduct the salary for which they have already taken work from the petitioner with the amount of pension of the petitioner.

Briefly stated the petitioner was employed as driver in Tehsil Bageshwar, District Almora. The petitioner retired on superannuation on 30.6.1988. A letter was issued to the petitioner on 3.5.1989, in which it was stated that due to fault of the department work has been taken from the petitioner till 31st May 1988 and actually the date of superannuation of the

petitioner was 30.6.1986, therefore, the salary and allowances received by the petitioner from 30.6.1986 to 30.6.1988 are liable to be recovered from him.

The Apex Court in the case Shyam Babu Varma and others vs. Union of India and others (1994) 2 SCC 621, dealing with the similar situation ruled that since the petitioner received higher pay scale not due to fault or his own, it shall not be just and proper to recover the salary already paid to him.
The Apex Court has observed as under:

> *"Although we have held that the petitioners were entitled only to the pay scale of Rs 330-480 in terms of the recommendations of the Third Pay Commission w.e.f. January 1, 1973 and only after the period of 10 years, they became entitled to the pay scale of Rs 330-560 but as they have received the scale of Rs 330-560 since 1973 due to no fault of theirs and that scale is being reduced in the year 1984 with effect from January 1, 1973, it shall only be just and proper not to recover any excess amount which has already been paid to them. Accordingly, we direct that no steps should be taken to recover or to adjust any excess amount paid to the petitioners due to the fault of the respondents, the petitioners being in no way responsible for the same."*

Counsel for the petitioner has referred the case of Ram Khelwan Pathak vs. State of U.P. and others (1998) 3 UPLBEC 1954, where the Allahabad High Court after placing reliance on the case of Shyam Babu Varma (supra) and several others cases has held that demand for refund of salary paid to employee who worked after the age of retirement, the salary paid be not

demanded from the petitioner and such demand is against the Article 23 of the Constitution of India, observations are quoted below:

> *"In a case where an employee has worked beyond the period of his retirement the residue period should be treated as fortuitous as has been held by Hon'ble Supreme Court in Judgment Today 1996 (2) S.C. 236, S.V. Bhima Bhatta and another vs. State of Karnataka and others. The matter also came to be considered in another case reported in Judgment Today 1997 (1) SC 353 Mahmood Hasan and others vs. State of U.P. and others, where the employees were reverted to a lower post as their promotion was against the rule, it was held that those who will have to step down on account of correctional process need not refund the pecuniary or other benefits enjoyed by them for they had actually worked during that period. There is yet another direct authority on the point reported in (1994) 2 SCC 621, Shyam Babu Varma and others vs. Union of India and others. In which the Apex Court dealing with the similar situation, ruled that since the petitioner received higher pay scale not due to fault or his own, it shall not be just and proper to recover the salary already paid to him. A Division Bench of this Court had the occasion to deal with the similar controversy in (1995) 3 U.P.L.B.E.C. 1840, Harish Chandra Srivastava vs. State of U.P. and others. In that case also, an order was passed without giving an opportunity to*

withhold superannuation benefits to the petitioner, who was wrongly promoted and was paid the higher salary. It was observed that the impugned order was liable to be quashed not only on the ground of want of affording reasonable opportunity of being heard to the petitioner but also on the ground that the petitioner cannot be held responsible for securing promotion on the higher scale of pay by misrepresenting the department and, therefore, payment of salary cannot be recovered. Also see Gabriel Saver Fermandes vs. State of Karnatka, 1995 Suppl. (1) SCC 149."

In view of above, a writ of certiorari is issued quashing the order dated 25th April 1989 passed by the respondent no. 1. Further a writ of mandamus is issued directing the respondents not to recover the salary paid to the petitioner after the age of retirement. Order dated 3rd May 1989 forwarded by the respondent no. 1 is hereby quashed.

Consequently, writ petition is allowed. No order as to costs.

Dated: 26.7.2006 **Rajesh Tandon, J.**

*Dhyani